

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE**

STATE OF MAINE, *et al.*

Plaintiffs,

v.

ANDREW WHEELER, Acting  
Administrator, United States Environmental  
Protection Agency, *et al.*

Defendants and

PENOBSCOT NATION, *et al.*

Defendants-Intervenors.

Civil Action No. 1:14-cv-264 JDL

**OPPOSITION OF THE PENOBSCOT NATION TO EPA’S MOTION FOR STAY OF  
THE PROCEEDINGS PENDING THE COURT’S DECISION ON EPA’S MOTION FOR  
VOLUNTARY REMAND**

*EPA’s Motion for a Voluntary Remand, Motion for Stay of the Proceedings Pending the Court’s Decision on EPA’s Motion for Voluntary Remand, and Incorporated Memorandum of Law*, ECF 139, filed late on Friday, July 27, 2018 is two motions in one. The EPA has moved to (a) voluntarily remand agency decisions to itself, *see* ECF 139 ¶¶ 3-7, and (b) amend the Scheduling Order in the meantime to be relieved of having to file its merits brief on the due date, Monday, July 30, 2018, *see* ECF 139 ¶8. Intervenor, the Penobscot Nation (the “Nation” or the “Tribe”), will file an objection to EPA’s first motion, for remand, within the 21-day timeframe provided by Local Rule 7(b). The Penobscot Nation is now opposing EPA’s second motion to be relieved of the Scheduling Order deadline to timely file its merits brief in this matter and to otherwise stay this action.

As more fully set forth below, that motion should be denied because EPA fails to meet the “good cause” standard required by FED. R. CIV. P. 16(b)(4). It offers no valid reason to be relieved from its obligation under the Scheduling Order to file its merits brief or to stop this case, in its entirety, in its tracks. On the contrary, given the EPA’s trust responsibility to protect the resources of the Penobscot Nation, it is obligated to file its merits brief. And it will face no prejudice whatsoever by doing so; for it was fully prepared to file that brief on June 27, 2018, one day before its last deadline, June 28, 2018. Thus, EPA’s last minute attempt to avoid the Scheduling Order deadline and, at the same time, to avoid its trust obligation to the Penobscot Nation, should be denied, and this matter should not be stayed pending the Court’s determination of whether EPA should be allowed to remand its decisions.

## **BACKGROUND**

### **I. The Penobscot Nation, Its Reservation Sustenance Fishing Right, And The Federal Trust Responsibility To Protect It**

The Penobscot Nation is a federally recognized Indian tribe. Its “aboriginal territory” is “centered on the Penobscot River.” S. REP. NO. 96-957 at 11 (1980) (“S. REP.”); H.R. REP. NO. 96-1353 at 11 (1980) (“H.R. REP.”), *reprinted in* 1980 U.S.C.C.A.N. 3786, 3787.

The Penobscots have relied upon the resources of the Penobscot River for their physical and cultural survival from time immemorial; their sustenance practices in the River are their cultural practices. *See* Declaration of Harald E. Prins, Exhibit A (“Prins Decl.”) and Exhibit 2 attached thereto; Declaration of Lorraine Dana, Exhibit B (“L. Dana Decl.”) at 1-3; Declaration of Christopher B. Francis, Exhibit C (“C. Francis Decl.”) at 1-2; Declaration of Barry Dana, Exhibit D (“B. Dana Decl.”) at 1 ¶¶ 5-9. The fish and other animals upon which Penobscot tribal members rely for their sustenance are in the waters of the Penobscot River. L. Dana Decl. at 1 ¶¶ 6-7; C. Francis Decl. at 1-2; B. Dana Decl. at 1 ¶¶ 5-9, 12.

The Tribe's river-based subsistence fishing practices are imbedded in the Tribe's language, culture, traditions, and belief-systems, including its creation legends. *See* Exhibit 2 to Prins Decl. at 3. Penobscot family names, *ntútem* (or "totems" in English), reflect the fish in the River: for example, *Neptune* (eel); *Sockalexis* (sturgeon), *Penewit* (yellow perch). Prins Decl. ¶4. And these practices are not mere romantic notions of the distant past; they are fundamental to who the Penobscots are as a unique indigenous people. *See* C. Francis Decl. at 1-2; B. Dana Decl. ¶11. Well into the 1990s, until education about contamination began to suppress their consumption of food sources from the River, Penobscot families ate fish, eel, and other animals from the River for up to four meals per week to the tune of two to three pounds per meal. Francis Decl. at ¶¶ 5-9; B. Dana Decl. ¶¶ 6-9.

In 1975, Judge Edward T. Gignoux held that the United States had a trust responsibility to protect the aboriginal territory and resources of the Passamaquoddy Tribe and the Penobscot Nation and ordered the United States to take such action as necessary to ensure that protection. *See Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Me. 1975). In accordance with Judge Gignoux's order, the United States, as trustee for the Penobscot Nation, commenced *United States v. Maine*, Civil No. 1969-ND (D. Me.) to challenge the validity of the Tribe's land cessions in its treaties with Massachusetts and Maine for want of federal approval under the Indian Nonintercourse Act. *See* S. REP., 12-13. The Penobscot Nation's 1796 and 1818 treaties with Massachusetts and its 1820 treaty with Maine were not approved by the federal government in accord with the Indian Nonintercourse Act, likely rendering the land cessions in those treaties void. *Id.*

In 1980, the Penobscot Nation, the Passamaquoddy Tribe, and the United States, as trustee for the tribes, agreed to settle *United States v. Maine*. These parties' settlement

agreement has three parts: (1) the tribes and Maine reached an “agreement” on jurisdictional allocations with respect to the tribes, their lands, and their resources, (2) the Maine enacted the Act to Implement the Indian Land Claims Settlement, effective only upon approval by Congress, to “implement” that agreement, 30 M.R.S.A. §§ 6201, *et. seq.* (“MIA”) and (3) pursuant to the Maine Indian Land Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1732 (“MICA”), Congress ratified the MIA, and, *inter alia*, set out the terms for the tribes to recover lands and for the dismissal of *United States v. Maine*, *see* 25 U.S.C. §§1721-32.

The Penobscot Nation’s reservation sustenance fishing rights received particular attention in the settlement of the land claims. Maine provided no monetary consideration for the settlement, but characterized, as worthy consideration, a concession that the Tribe’s retained authority to exercise sustenance fishing was secured under principles of federal Indian law. *See, e.g.*, Joint Legal Supp. Exhibit 15 at 417-418, 425, 436; Joint Legal Supp. Exhibit 39 at 1110. Penobscot tribal member, Lorraine Dana, a single mother, who fed her family with fish caught from reservation waters in the Penobscot Reservation by her son, Penobscot tribal member, Barry Dana, testified at the Senate hearings on the Settlement Acts. *See* L. Dana Decl. ¶¶ 13-15; B. Dana Decl. ¶¶ 6-9. Under the mistaken belief that Maine would be granted full authority over the Penobscot fishing rights, she testified:

My son hunts and fishes my islands to help provide for our family, and if we are to abide by State laws, as this bill intends us to, my family will endure hardship because of the control of the taking of . . . fish. You know well as I, inflation has taken its toll, and at the present time I am unemployed and have a family of five to support. Two of these children are going to college. I have brought them up myself.

Joint Legal Supp. Exh. 39 at 1380. In stating “my son . . . fishes my islands,” she used a Penobscot locution, meaning he fished in the Penobscot River in the waters surrounding her family’s allotted islands in the River near Lincoln, Maine. *See* L. Dana Decl. at 1, 3 ¶¶ 5,16.

Congress responded that the Penobscot sustenance fishing and hunting rights confirmed in the Settlement Acts were “examples of expressly retained sovereign activities” and protected under the First Circuit’s decision in *Bottomly v. Passamaquoddy Tribe*, which Congress characterized as “holding that the Maine Tribes are *entitled to protection under federal Indian common law doctrines*.” S. REP., 13-17 (emphasis added); H.R. REP., 13-17 (emphasis added). Congress further promised that “[n]othing in the settlement provides for acculturation”; rather the settlement “offers protection against” any disturbance of the Tribe’s “cultural integrity” by confirming tribal self-governance. S. REP., 17; H.R. REP., 17.

Congress then ratified the sustenance fishing provision set out in MIA, providing, in pertinent part, that notwithstanding “any law of the State, the members of the Penobscot Nation may take fish, within the boundaries of [the] reservation[] for their individual sustenance,” *id.* §6207(4). *See* MICA §1725 (b)(1) (ratifying MIA).

At the time of the MICA and thereafter, Penobscot tribal members continued to rely upon the waters and bed of the Penobscot River from the Tribe’s principal reservation community at Indian Island, northward, to fish, hunt, and trap for sustenance, *see, e.g.,* C. Francis Decl.; B. Dana Decl.

## **II. The United States Trust Responsibility And The Agency Decisions At Issue**

The United States Department of the Interior (“DOI”) is the federal agency in charge of administering MICA. *Passamaquoddy Tribe v. State of Maine*, 75 F. 3d 784, 794 (1st Cir. 1996). In 1997, in the face of an argument asserted by Maine that EPA had no trust responsibility to protect the Nation’s reservation sustenance fishing rights in issuing a pollutant discharge permit to Lincoln Pulp & Paper into waters where the Nation exercises those rights, DOI explained that the State’s view was “erroneous”:

Since there exists a trust relationship between the Maine Tribes and the United States, EPA must act as a trustee when taking federal actions which affect tribal resources. When taking such actions, EPA's fiduciary obligation requires it to first protect Indian rights and resources. . . . Thus, fulfillment of EPA's trust responsibility must entail considerations beyond the minimum requirements in the Clean Water Act (CWA) and in MICA *to fully protect* the PIN's rights and resources.

Exhibit E at 4 (emphasis added). DOI further clarified that “[a]s with a treaty, MISCA is similarly the ‘supreme law of Land,’ and creates rights and liabilities which are virtually identical to those established by treaties.” *Id.* at 3 n.3.

In the instant case, the EPA obtained a formal opinion from DOI in its capacity as the administrator of MISCA to guide its decision to disapproving Maine's water quality standards (“WQS”) with respect to human health criteria as they apply to the waters of the Penobscot Indian Reservation and the Nation's trust lands. *See* DOI Opinion, Exhibit F. In that opinion, DOI wrote that “the trust relationship counsels *protection* of tribal fishing rights in Maine,” that “[t]o satisfy a tribal fishing right to continue culturally important fishing practices, fish cannot be too contaminated for consumption and sustenance level,” and that “[f]undamental, long-standing tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right.” Exh. F at 10 (emphasis added).

Following DOI's opinion and its trust responsibility to protect tribal resources, the EPA issued the agency decisions at issue in this case because Maine's water quality standards did not allow the Tribe to safely exercise its sustenance fishing right confirmed by Congress in MISCA. ECF 30-1 at PageID# 930-32, 956-57 (“Fundamentally, the Tribe[']s ability to take fish for [its] sustenance under the Maine settlement acts would be rendered meaningless if it were not supported by water quality sufficient to ensure that tribal members can safely eat the fish for their own sustenance.”).

### **III. Relevant Procedural History**

In early 2015, EPA issued its decision described above and formally approved the bulk of Maine's WQS, but to disapproved those it found insufficiently protective of tribal sustenance fishing rights in tribal waters. *See* ECF 22, 26. Rather than revise its WQS to protect those rights in accord with EPA's decision, Maine instead amended its complaint to challenge EPA's disapprovals. ECF 30.

In the wake of Trump's election, in February, 2017, Maine petitioned EPA Administrator Scott Pruitt to reconsider its decisions, ECF 93-1, leading to a seven month stay of this case between May and December, 2017, *see* ECF 103 at PageID# 3514; ECF 109. That effort proved unsuccessful. "After careful consideration," EPA reported to this Court, it decided "not to withdraw or otherwise change any of the decisions that are challenged in this case." *Id.* at PageID#3526.

In January, the Court issued a Scheduling Order for the parties to brief the merits. ECF 117. In accord with that order, Maine filed its opening merits brief on February 16, 2018. ECF 118. After requesting and obtaining a one-week extension, EPA's brief was due on June 28, 2018. On June 26, however, Maine and EPA filed a joint motion for a 30-day stay, representing that they were engaged in working on a settlement; albeit, one that excluded substantive participation by intervenors, the Penobscot Nation and the Houlton Band of Maliseet Indians. *See* ECF 132; ECF 136 at PageID# 3710.

In a telephone conference held on June 27, 2018, EPA Regional Administrator, Alexandra Dunn, told Penobscot Nation representatives, including Penobscot Nation Chief Francis that the EPA was "prepared to file [its brief] tomorrow" to "fully defend" EPA's decisions, but that EPA and Maine wanted to stay the case for 30 days to explore a framework

for settlement. Declaration of Kirk Francis ¶2, Exhibit G (“K. Francis Decl.”). In a telephone conference held on July 27, 2018, EPA Administrators announced to Penobscot representatives that the EPA would file a motion to voluntarily remand its decisions in order to reconsider them. *Id.* ¶3. When Penobscot representatives asked for an explanation of the reasons for EPA’s change of position, they were told by EPA representatives that one could not be provided and that they would see the explanation in the motion papers. *Id.* ¶4. When Penobscot representatives asked if DOI had been consulted about EPA’s reversed course, they were told that EPA had not consulted with DOI, other than seeking a supplemental opinion that was filed in this case. *Id.* ¶5.<sup>1</sup>

### ARGUMENT

“An unbroken line of Supreme Court decisions . . . [establish] the fiduciary relationship between the Federal Government” and Indian nations. *Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 662 (D. Me. 1975). This trust responsibility is grounded in the Constitution’s allocation of plenary authority over Indian affairs to Congress. *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Penobscot Nation v. Feller*, 164 F.3d 706, 709 (1st Cir. 1999). It involves “the punctilio of an honor the most sensitive.” *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 197 (2011) (citing and quoting *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928) (Cardozo, C.J.)). And it is particularly heightened where, as here, state control over tribal resources is at stake. See CANBY, AMERICAN INDIAN LAW 138 (West 2004) (“[o]ne of the basic premises underlying the constitutional allocation of Indian affairs to the federal government was that the states could not be relied upon to deal fairly with the Indians”); *accord*

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<sup>1</sup> In that supplemental opinion, DOI reaffirmed its prior formal opinion, writing to EPA “that to be rendered meaningful” the Penobscot Nation’s reservation sustenance fishing rights “by necessity” include “subsidiary rights to water quality.” ECF 129-1 at PageID# 3686.

*State of Washington, Dep't of Ecology v. U.S.E.P.A.*, 752 F.2d 1465, 1469-70 (9th Cir. 1985).

The principles that led Judge Gignoux to order the United States to exercise its trust responsibility to file *United States v. Maine* operate here, perhaps even more so. EPA's decisions in this case issued pursuant to its trust obligation to protect the sustenance fishing rights of the Penobscot Nation. The Interior Department, the federal agency charged with the administration of MISCAs, directed the EPA that "the trust relationship counsels protection of tribal fishing rights in Maine" and that such protection mandated that the fish "cannot be too contaminated for consumption at sustenance levels." Exh. F at 10. EPA properly followed DOI's opinion and, with great time and careful deliberation, disapproved specific Maine WQS that fail to so protect the Nation's sustenance fishing right. *See* ECF 30-1.

DOI has not been consulted by EPA with respect to its decision to now reverse course. *See* K. Francis Decl. ¶5. And, DOI's views, under the new Trump Administration, do not retreat from the 2015 DOI opinion that grounds the EPA decisions at issue with respect to the Penobscot Nation's reservation sustenance fishing rights. *See* ECF 129-1 at PageID#3687-88.

In short, consistent with the direction given by the federal agency charged with administering the Settlement Acts, EPA has a fiduciary responsibility to protect the Nation's reservation sustenance fishing resources, it has done so in accord with the decisions at issue, and it should file its merits brief in support of those decisions in furtherance of that responsibility. Not doing so not only runs at cross-wires with the standing position of DOI, but would be tantamount to EPA reneging upon its trust obligations to protect the Penobscot Nation.

Beyond this, FED. R. CIV. P. 16(b)(4), provides that "[a] schedule may be modified only for good cause." This a "stringent standard" that requires "showing that the deadline cannot be reasonably met despite the diligence of the party seeking the extension. Other factors, such as

prejudice to the opposing party, may [also] be considered by the Court.” *Puerto Rico Med. Emergency Grp., Inc. v. Iglesia Episcopal Puertorriquena, Inc.*, 319 F.R.D. 65, 69 (D.P.R. 2016) (citations omitted).

EPA fails entirely to meet this standard. By its own admission and prior representations to this Court it was fully prepared to file its merits brief when due on June 28, 2018. *See* K. Francis Decl. ¶2; *see also* ECF 130 (EPA representing on 6/18/18 that it “has worked diligently to meet the current June 21, 2018 filing deadline but need 7 more days to file). In its motion, it provides no reason to be relieved of its obligation to timely file its merits brief; it simply presumes that it will moot the case if it prevails on its motion to remand. That is sheer speculation. Moreover, even if that motion were granted, it could only affect Count I of Maine’s Second Amended Complaint, for APA review of the decisions (and remains to be seen how it would); such a remand would not, as EPA claims, “obviate” the need for briefing on Maine’s Count II, a freestanding count for declaratory relief. The Nation has a significant interest in litigating that Count. Thus, stopping this case in its tracks in accord with EPA’s request would prejudice the Nation.

Finally, although prejudice to EPA is not a factor for consideration under Rule 16(b)(4), holding EPA to the Scheduling Order will cause it no prejudice whatsoever. If it is able to prevail on its motion for remand, it can disclaim its prior decisions at a later date as it may see fit. In the meantime, EPA has represented to the Court that it does not “concede legal error with respect to its February 2015 decisions.” ECF 139 at PageID 3720.

### **CONCLUSION**

EPA should be required to file its brief in accord with Scheduling Order.

Respectfully submitted this 29<sup>th</sup> day of July, 2018.

/s/ Kaighn Smith, Jr.

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### **CERTIFICATE OF SERVICE**

I hereby certify that on July 29, 2018 I electronically filed this Opposition to EPA's Motion for Stay of the Proceedings Pending the Court's Decision on EPA's Motion for Voluntary Remand with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Kaighn Smith, Jr.

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